Petition

Office-Supreme Court, U.S.
FILED
SEP 10 1981
ALEXANDER L. STEVAS,
CLERK

81-493

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN E. MURPHY,

Petitioner,

v.

SECRETARY OF THE NAVY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Superintendent was authorized by Congress pursuant to 10 U.S.C. 6962 to incorporate into the Honor Concept of the Brigade of Midshipmen, USNAINST 1610.3B, July 6, 1977 those proceedings challenged by Petitioner?

Was Petitioner's discharge from the U.S. Naval Academy a violation of the due process clause of the Fifth Amendment since it was accomplished by procedures that failed to meet the minimum standards of fundamental fairness generally granted unto members of the military community in relation to the severity of the punishment?

Did the Respondent properly believe it was a reasonable and well founded determination by the Superintendent to recommend Petitioner's discharge from the Naval Academy?

Did the Respondent illegally discharge Petitioner as a result of the Superintendent forwarding a letter to the Respondent recommending Petitioner's discharge without permitting Petitioner to comment thereon?

Did Respondent lawfully order Petitioner to active duty when the Petitioner is not qualified for appointment as a commissioned officer in the Regular Navy?

Was Petitioner's right to due process violated by the act of the Superintendent in forwarding to the Respondent the letter of April 3, 1980 and the act of the Respondent ordering Petitioner to active duty?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Order of the United States Court of Appeals for the District of Columbia Circuit dated June 12, 1981 denying a petition for rehearing is reproduced in the Appendix at page 1a. The Order of the said United States Court of Appeals dated May 1, 1981 affirming the judgments of the District Court is reproduced in the Appendix at page 3a. The Memorandum Order of the United States District Court for the District of Columbia

dated October 16, 1980 in Civil Action No. 80-1919 denying the petition for Writ of Habeas Corpus is reproduced in the Appendix at page 5a. The Memorandum Opinion of the said District Court dated July 3, 1980 in Civil Action No. 80-1069 denying Petitioner's motion to vacate is reproduced in the Appendix at page 10a. The Memorandum Opinion of the said District Court dated June 4, 1981 granting Respondent's motion for summary judgment is reproduced in the Appendix at page 14a.

JURISDICTION

The jurisdiction of the Court is invoked on the grounds of the Order of the United States Court of Appeals for the District of Columbia Circuit, dated May 1, 1981, pursuant to Title 28 U.S.C., Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution (*see* Appendix, p. 18a), 10 United States Code 6959 (*see* Appendix, p. 21a), 10 United States Code 6962 (*see* Appendix p. 22a), 10 United States Code 505 (*see* Appendix, p. 19a), and 10 United States Code 510 (*see* Appendix, p. 19a).

STATEMENT OF THE CASE

Petitioner (hereinafter Murphy) executed an Engagement To Serve, wherein, if appointed a midshipman in the United States Navy, he expressedly engaged, *inter alia*, to complete the course of instruction at the United States Naval Academy and to accept an appointment, if tendered, as a commissioned officer in the Regular Navy

and serve for at least five years. In accordance with 10 U.S.C. 6959, a midshipman who does not fulfill his agreement may be transferred by the Secretary of the Navy (hereinafter Secretary) to the Naval Reserve in appropriate enlisted grade or rating, and notwithstanding 10 U.S.C. 651, may be ordered to active duty to serve in that grade or rating for such period of time as the Secretary prescribes, but not for more than four years.

The President appointed Murphy a midshipman. Murphy entered the Naval Academy, successfully completed more than three years of the course of instruction and was scheduled to graduate in May 1980.

In January 1980 Murphy was accused of violating the Honor Concept of the Brigade of Midshipman, USNA Instruction 1610.3B (hereinafter Honor Concept), in that Murphy cheated through the use of unauthorized assistance in the completion of a term paper, in that he did not properly reference research material.

Murphy wrote the book review from 0100 to 0500 on the morning of the final examination. During the semester Murphy made several trips to Bethesda Naval Hospital missing twenty-five class periods and was responsible for an unusually large amount of squad business.

In the Honor Concept, definitions are set forth as follows:

5. *Definitions.*

a. The following definitions are pertinent to the Midshipman Honor Concept:

(1) Lying: To state knowingly an oral or written untruth. A lie may be either a declarative statement or a response to a question which is known to be false. It is also a lie to knowingly

misrepresent the true situation or to deceive by withholding, omitting or subtly wording information in such a way as to leave an erroneous or false impression of the known true situation. . . .

(2) Cheating: To use unauthorized assistance in submitted work designated to represent one's own efforts or to fail to indicate properly any authorized assistance received.

(a) Plagiarism: Plagiarism is the submission of another's work, whether published or unpublished, or ideas by claiming them as one's own by not giving proper reference to that work. . . .

(b) Assistance: To receive assistance is allowed and encouraged on homework assignments unless prohibited by the instructor. Receiving assistance on individual assignments, other than homework, is permitted only when a midshipman's instructor specifically allows it. . . .

(3) Stealing: To take, obtain or withhold property or anything of value wrongfully from the possession of the true owner with the intention of permanently or temporarily depriving the owner of its use of possession.

(4) Intent: In lying, cheating, or stealing, the state of mind of the accused is an integral part of the violation. To be guilty, an accused need not have intended to commit an honor violation, but he must be found to have knowingly done the dishonorable act. A guilty state of mind may be established either by direct evidence—for example, by words proved to have been used by the accused—or by indirect evidence; i.e., from the circumstances surrounding the alleged honor violation. Voluntary intoxication is not a defense to a violation of the Honor Concept unless the state of inebriation at the time of the alleged violation was so great as to have

rendered the accused incapable of possessing the knowledge required for the violation. This defense may be offered as an extenuating circumstance to a violation of the Honor Concept.

The Honor Concept provides that counsel may not be present during the investigative proceedings by the Honor Board. Murphy appeared with a midshipman advisor before the Honor Board and on the advice of his midshipman advisor admitted to having cheated through plagiarism, Definition 5a-(2)(a), *supra*, but denied that he had intended to commit the violation, Defintion 5a-(4), *supra*.

The Honor Concept instructs the Honor Board that in order to arrive at a finding that the Honor Concept has been violated, the Board must be satisfied by a preponderance of the evidence that the accused midshipman had committed an honor violation as set forth and defined in the Honor Concept. While the Honor Concept instructs the Honor Board concerning findings of an Honor Concept violation, the Honor Concept procedures call for the Honor Board to vote for the accused midshipman's separation/retention by the Commandant and to state the reasons for such vote.

The Honor Board was comprised of six members who unanimously voted for Murphy's separation from the Naval Academy by the Commandant giving reasons for the vote, such as, "I feel that Mr. Murphy was partially ignorant as to what he had done and possibly unaware as to the gravity of the situation that was beginning to confront him. I do not believe that an act of this nature, for whatever reason or lack of intelligence, can be tolerated."

The Commandant reviewed the record of the Honor Board's proceeding and held an informal personal hearing with Murphy after which he recommended by memorandum to the Superintendent dated February 21, 1980, that Murphy be discharged.

The Superintendent considered the evidence before the Honor Board and held two informal personal hearings with Murphy. The Superintendent prepared a Memorandum Report dated March 18, 1980, to the Secretary referencing 10 U.S.C. 6962 and in conjunction with the Commandant's Memorandum dated February 21, 1980, recommended Murphy's "discharge from the Naval Academy in accordance with 10 U.S.C. 6962." Murphy was given a copy of this Memorandum Report.

Murphy examined the Superintendent's Memorandum Report and in accordance with 10 U.S.C. 6962 submitted a written statement thereon, a show-cause statement dated March 31, 1980. This show-cause statement was forwarded to the Secretary via the Superintendent.

Thereafter, the Superintendent directed a letter dated April 3, 1980, to the Secretary via Commander Naval Military Personnel Command recommending Murphy's discharge from the Naval Academy and enclosing, *inter alia*, his Memorandum Report dated March 18, 1980; Murphy's show-cause statement of March 31, 1980; and Presiding Officer, Brigade Honor Board letter dated February 5, 1980, with enclosures thereto. The Superintendent commented upon Murphy's show-cause letter. In this letter dated April 3, 1980, the Superintendent recommended that Murphy "be transferred to the Naval Reserve in an enlisted status and called to active duty for a period of three years." The Superintendent did not forward Murphy a copy of this letter.

In accordance with the recommendation of the Superintendent, the Secretary, by letter dated April 16, 1980, discharged Murphy from the Naval Academy to take effect upon completion of the processing for separation and transferred him to the U.S. Naval Reserve and ordered him to active duty for a period of three years.

Murphy underwent a separation physical examination and was found not qualified for and to perform all duties of his/her rank/rate at sea or foreign shore. The Report's recommendations noted that Murphy "has been granted a waiver for administration discharge—SEE MEDICAL BOARD—for duty limited to shore establishment."

The Medical Report's recommendations citing a waiver reference Murphy's precommissioning physical examination which he underwent in December 1979 in anticipation of graduation in May 1980, wherein Murphy was found not qualified for USN and USMC.

A Medical Board concurred in the precommissioning diagnosis which is disqualifying for commissioning in the U.S. Naval Service. The Board conditionally recommended at the time of graduation that Murphy be granted a commission in the Restricted Line/Staff Corps with duty limited to the shore establishment.

Murphy, in his Statement of Patient Concerning the Findings of a Medical Board, offered that his case be referred for departmental review and that:

> "At the time of graduation, if otherwise qualified and if my services can be so utilized, that I be granted a commission in the Restricted Line/Staff Corps of the U.S. Navy with duty limited to the shore establishment."

The Medical Board Report and Murphy's Statement were forwarded to Commander, Naval Military Personnel Command with concurring endorsements by the Superintendent and Chief, Bureau of Medicine and Surgery.

The termination of Murphy's appointment as a midshipman was effective April 28, 1980, and Murphy was enlisted on April 29, 1980, into the U.S. Naval Reserve for a period of three years with initial service to be in the pay grade of SN to serve at least thirty-six months on active duty. Murphy's Enlistment Agreement does not show Murphy's signature in applicable block but rather the statement "NOT REQUIRED LAW BUPERSMAN 3850400."

By letter dated May 5, 1980, Chief of Naval Personnel citing Murphy's Medical Board reports of December 1979, the precommissioning physical examination, assigned Murphy a limited duty designator in accordance with BUPERSMAN 1830120, a directive which provides for retention on active duty of enlisted members whose physical condition falls below the standard normally acceptable for retention. In addition, personnel assigned to a limited duty designator shall not be permitted to extend their enlistments, reenlist, or to further obligate themselves for additional active duty unless authorized by the Chief of Naval Personnel.

Murphy is on active duty as an enlisted yeoman seaman assigned in a Regular Component, namely, Administrative Department, Word Processing Center, Naval Submarine Support Facility, New London, Connecticut.

Murphy filed Civil Action No. 80-1069 in the United States District Court for the District of Columbia on April 28, 1980, including his complaint and a motion for a temporary restraining order to enjoin the Secretary

from discharging him from the Naval Academy, which was argued and denied on April 28, 1980. On April 29, 1980, Murphy filed an amended complaint and reargued the motion for a restraining order which was granted and an order was issued on April 29, 1980. A further hearing regarding the temporary restraining order was held on April 30, 1980, and the temporary restraining order was dissolved on April 30, 1980. The Secretary filed a motion to dismiss, or, in the alternative, for summary judgment which was argued and the motion for summary judgment granted on June 4, 1980. Thereafter Murphy moved to vacate judgment, which motion was denied on July 3, 1980.

Murphy filed Civil Action No. 80-1919 in the United States District Court for the District of Columbia on August 1, 1980, petitioning by habeas corpus for an order directing the Secretary to discharge him from custody as an enlisted member in the United States Navy on active duty, alleging a wrongful order by the Secretary. The Court ordered the Secretary to show cause and a return and answer were made which were replied to and there was a response to the reply. The Court denied the petition on October 16, 1980. Thereafter, Murphy moved to vacate the order, which motion was denied on November 13, 1980, without opinion.

Thereafter, Murphy appealed both actions. The Secretary moved and the Court so ordered that the appeals be consolidated. The United States Court of Appeals for the District of Columbia Circuit on May 1, 1981, ordered without opinion that the judgments of the District Court are hereby affirmed. On June 12, 1981, the Court denied Murphy's petition for rehearing.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Circuit Court affirmed the judgments of the District Court (1) granting summary judgment in that action for declaratory judgment against the Respondent who, it was alleged, illegally and in violation of 10 U.S.C. 6962 caused Petitioner to be discharged from the United States Naval Academy and (2) denying a petition for writ of habeas corpus alleging the Respondent ordered the Petitioner to active duty for a period of three years in violation of applicable statutes and regulations of the Navy, including 10 U.S.C. 6959.

Petitioner respectfully contends that his discharge from the Naval Academy resulted from Honor Concept proceedings not authorized by Congress pursuant to 10 U.S.C. 6962, and the said proceedings are a violation of the due process clause of the Fifth Amendment since his discharge was accomplished by proceedings that failed to meet minimum standards of fundamental fairness. In addition, it is contended that the act of the Superintendent in forwarding to the Secretary a letter dated April 3, 1980 recommending Murphy's discharge without permitting Murphy to comment thereon and the act of the Secretary in ordering Murphy, who is not physically qualified, to active duty are in violation of the provisions of 10 U.S.C. 6962 and Murphy's right to due process.

MIDSHIPMEN

The President appointed Murphy a midshipman, one of the rank next below a commissioned officer and to be distinguished from an enlistment, which is a contract of service that an individual enters into with the United States or a state. A midshipman is a member of the Regular Armed Forces and is subject to all statutory

provisions applicable to other members of the military, including the Uniform Code of Military Justice (hereinafter UCMJ).

It is well settled that the rights of men in the Armed Forces must perforce be conditioned to meet certain overriding demands of discipline and duty. Article I, section 8 of the Constitution empowers Congress to make Rules for the Government and Regulation of the land and naval Forces. The importance of maintaining an effective military to insure national security renders this power especially broad. Consequently, a court reviewing legislatively approved military procedure "must give particular deference to the determination[s] of Congress." *Middendorf v. Henry*, 425 U.S. at 43.

Murphy is not challenging congressional decisions governing military practices, but rather that Congress has not authorized the Secretary to discharge midshipmen in a manner as complained of by Murphy.

CONGRESSIONAL REGULATIONS

Congress has authorized procedures and norms for disposing of cases involving servicemen's offenses. Congress enacted the UCMJ requiring that when substantial penalties may be imposed general courts-martial and special courts-martial are convened which resemble judicial proceedings, nearly always presided over by lawyer judges, with lawyer counsel for both sides; when dealing with most minor offenses, the serviceman is subject to an informal Article 15 procedure conducted personally by the accused's commanding officer; and, lying between the informal Article 15 procedure and the judicial procedures of general and special courts-martial, the serviceman may be subjected to a summary court-martial

designed to exercise justice promptly for relatively minor offenses in an informal proceeding conducted by a single commissioned officer with jurisdiction only over non-commissioned officers and other enlisted personnel. If the accused does not consent to trial by summary court-martial, the case will either be referred to a special or general court-martial, or be dismissed.

In courts-martial, including summary courts-martial which are not a criminal prosecution as the term is used in the Sixth Amendment, guilt is to be established by legal and competent evidence beyond reasonable doubt.

Custom and written interpretation of the West Point Cadet Honor Code proceedings before the Cadet Honor Committee mandates the establishment of guilt beyond a reasonable doubt and by a unanimous verdict. If the Cadet Honor Committee recommends separation from the Corps of Cadets, the cadet is given the option of resigning or appearing before a board of senior officers wherein he will be represented by counsel throughout such proceedings.

It is respectfully submitted that in disposing of cases involving servicemen's offenses, either Congress has authorized, or tradition and well recognized safeguards within the military community provide, in all cases with the exception of informal administrative proceedings for the imposition of minor punishment for minor offenses, that (1) guilt is to be established by legal and competent evidence beyond reasonable doubt and (2) the serviceman will be provided with lawyer counsel unless the accused consents to trial by summary court-martial.

HONOR CONCEPT

The Superintendent has established and maintains the Honor Concept pursuant to 10 U.S.C. 6962, wherein

Congress has authorized that the Superintendent shall submit to the Secretary in writing a full report of the facts whenever the Superintendent determines that the conduct of a midshipman is unsatisfactory, thus subjecting the midshipman to discharge.

The legal basis, particularly for the punitive aspects of the Honor Concept, is the UCMJ. Lying, cheating, and stealing are punishable under military law. Specific articles of the UCMJ which could apply vary with the circumstances, but include articles 80, 92, 107, 122, 123, 133 and 134.[1] Further, while the acts of lying, cheating and stealing are serious violations under the Naval Academy Administrative Conduct System, the Superintendent has provided that such alleged acts will normally be treated under the Honor Concept.

The Superintendent did establish and does maintain the Honor Concept wherein:

- Every midshipman is presumed to be honorable until reasonable doubt is created to the contrary;
- The accused midshipman is denied representation by legal counsel during the adversarial hearing before the Honor Board;
- The Honor Board must be satisfied by a preponderance of the evidence that the accused midshipman committed an honor violation as set forth and defined in the Honor Concept;
- The Honor Board votes for the accused midshipman's separation/retention by the Commandant and states reasons for such vote;

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[1]A Prayer for Relief—The Constitutional Infirmities of the Military Academies' Conduct, Honor and Ethics Systems, Michael T. Rose, New York University School of Law, 1973 at p. 7.

- The Commandant reviews the investigation and all other facts pertaining to the case and holds a hearing with the midshipman found guilty of committing a violation; and
- The Superintendent reviews the entire investigation, including the Commandant's hearing.

It cannot be disputed that the Honor Concept deals with the disposing of cases involving servicemen's offenses. It is submitted that the adversarial proceeding before the Honor Board, which ultimately may result in substantial penalties being imposed upon a midshipman, is analogous to a general or special court-martial which Congress has ruled requires guilt to be established by legal and competent evidence beyond a reasonable doubt and representation by lawyer counsel. Further, it is submitted that, the midshipman having been charged by the Honor Board, the Commandant's informal hearing is analogous to an Article 15 procedure which Congress has ruled should deal with minor offenses.

The Superintendent has patched together a series of proceedings under the umbrella of the Honor Concept, the separate and individual proceedings are inconsistent and not in harmony with the procedures and norms authorized by Congress for disposing of cases involving servicemen's offenses.

Murphy respectfully submits that he was not afforded the standard protection generally granted unto members of the military community in relation to the severity of punishment. Murphy was tried under such procedures which violate the intent of Congress and which lack fundamental fairness depriving Murphy of liberty and property without due process of the law, thus violating the due process clause of the Fifth Amendment.

DUE PROCESS

As a generalization, it can be said that due process embodies the differing rules of fair play which, through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtains in a specific proceeding depends upon a complexity of factors. The nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account. *Hannah v. Larche,* 363 U.S. 420.

It is respectfully submitted that those standards of fundamental fairness for providing procedural safeguards to members of the military community accused of servicemen's offenses are clearly discernible, to wit, the severity of the punishment to which a military member may be subjected determines the procedural safeguards to be enforced. Murphy's discharge for unsatisfactory conduct is in severity of punishment comparable to that of a bad conduct discharge. Importantly, Congress has legislated that a member of the military community subject to a bad conduct discharge will be tried under the provisions of a special court-martial. 10 U.S.C. § 819.

Murphy was discharged as a midshipman because of unsatisfactory conduct; more particularly, a failure to properly footnote a term paper written between the hours of 0100 and 0500 on the morning of the final examination. At the Honor Board hearing, Murphy, without the benefit of lawyer counsel and as a direct consequence of the definitions as set forth in the Honor Concept, admitted to cheating through plagiarism, Definition 5a(2)(a), *supra,* but denied the intent to commit the violation, Definition 5a(4), *supra.* Using the preponderance of evidence standard, the Honor Board voted for his separation. Thereafter the Honor

Board recommendation was approved by the Commandant after reviewing the investigation and holding an informal hearing with Murphy.

Distinguishing the proceedings of the Honor Court which resulted in Murphy's discharge as a midshipman because of unsatisfactory conduct and the rules authorized by Congress for discharge because of bad conduct, it is respectfully submitted that Murphy was discharged from the Naval Academy in violation of the due process clause of the Fifth Amendment since it was accomplished by procedures that failed to meet the minimum standards of fundamental fairness generally granted unto members of the military community in relation to the severity of the punishment.

MURPHY'S DISCHARGE

In accordance with 10 U.S.C. 6962, the Superintendent is required to submit to the Secretary in writing a full report of the facts whenever the Superintendent determines that the conduct of a midshipman is unsatisfactory and cause for discharge. A midshipman upon whom a report is made shall be given an opportunity to examine the report and submit a written statement thereon. If the Secretary believes, on the basis of the report and statement, that the determination of the Superintendent is reasonable and well founded, the Secretary may discharge the midshipman from the Naval Academy and from the Naval Service.

By Memorandum Report dated March 18, 1980, the Superintendent prepared for the Secretary in writing a full report of the facts wherein the Superintendent determined that the conduct of Murphy was unsatisfactory and recommended his "discharge from the Naval Academy in accordance with 10 U.S.C. 6962." Murphy

examined the said Memorandum Report and submitted a written statement thereon, Show Cause Statement dated March 31, 1980.

By letter dated April 3, 1980, the Superintendent forwarded to the Secretary, *inter alia*, the said Memorandum Report, Murphy's said Show Cause Statement and the Presiding Officer's letter. In contradistinction to the said Memorandum Report, the Superintendent then recommended that Murphy "be transferred to the Naval Reserve in an enlisted status and called to active duty for a period of three years." A copy of the said letter of April 3, 1980, was not forwarded to Murphy.

By letter dated April 16, 1980, the Secretary discharged Murphy from the Naval Academy in accordance with the recommendation of the Superintendent and, in accordance with the provisions of 10 U.S.C. 6959, transferred him to the U.S. Naval Reserve and ordered him to active duty for a period of three years.

Murphy respectfully submits that the Superintendent violated the provisions of 10 U.S.C. 6962 by forwarding the letter with enclosures dated April 3, 1980, without giving Murphy the opportunity to examine the letter and submitting a written statement thereon.

Murphy further submits that the Secretary violated the provisions of 10 U.S.C. 6962 by failing to present a reasoned explanation for accepting the recommendation of the Superintendent, particularly, the recommendation that he be ordered to active duty for a period of three years in view of the fact that Murphy is not qualified for appointment as a commissioned officer in the Regular Navy.

ORDERS TO ACTIVE DUTY

Murphy executed an Engagement To Serve wherein, if appointed a midshipman in accordance with 10 U.S.C. 6959, he engaged, *inter alia*, to complete the course of instruction at the Naval Academy and to accept an appointment, if tendered, as a commissioned officer in the Regular Navy.

In anticipation of graduation in May of 1980, Murphy underwent a precommissioning physical examination and was found not qualified for USN and USMC. Therefore, Murphy would not be tendered an appointment as a commissioned officer in the Regular Navy as delineated in his Engagement to Serve. A Medical Board concurred in the precommissioning examination and recommended at the time of graduation, if otherwise qualified and if Murphy's service's could be utilized, that he be granted a commission in the Restricted Line/Staff Corps of the U.S. Navy with duty limited to the shore establishment.

As a consequence of the Board recommendation, Murphy made an offer, Statement of Patient Concerning the Findings of a Medical Board, that his case be referred for departmental review and that:

> "At the time of graduation, if otherwise qualified and if my services can be so utilized, that I be granted a commission in the Restricted Line/Staff Corps of the U.S. Navy with duty limited to the shore establishment."

Murphy's appointment as a midshipman was terminated effective April 28, 1980, and Murphy was enlisted on April 29, 1980, into the U.S. Naval Reserve for a period of three years with initial service to be in the pay grade of SN to serve at least thirty-six months on active duty. Murphy's Enlistment Agreement does not show

Murphy's signature in applicable block, but rather the statement "NOT REQUIRED LAW BUPERSMAN 3850400."

Congress has authorized the Secretary to prescribe physical, mental, moral, professional, and age qualifications for the enlistment of persons as members in reserve components. 10 U.S.C. 510. Reserve components: qualifications.

Importantly, Congress has authorized the Secretary to accept original enlistments in the regular components of qualified, effective, and able-bodied persons who are not less than seventeen years of age, nor more than thirty-five years of age. 10 U.S.C. 505. Regular components: qualifications, term, grade.

Since Congress has authorized the Secretary to prescribe physical qualifications for enlistment of persons in reserve components, the Secretary did lawfully enlist Murphy in the Naval Reserve, *i.e.*, reserve component. However, it is respectfully submitted that Congress has not authorized the Secretary to call Murphy to active duty in a regular component since he is not a qualified and able bodied person. Further, it is submitted that Murphy's offer to accept a commission in the Restricted Line/Staff Corps is not legally efficacious to waive congressional authorization of enlistment in regular components, nor is it relevant to Murphy's enlistment and order to active duty.

Having failed to comply with applicable congressional regulation, the Secretary has illegally ordered Murphy to active duty in a regular component and has violated Murphy's due process rights.

CONCLUSION

Petitioner respectfully submits that his case is of exceptional importance because it impacts upon the Brigade of Midshipmen, that body of persons who will be entrusted with the responsibility of maintaining the naval defense of this nation, including the responsibility of administering military justice.

The case presents a definite issue as to whether Congress has authorized the Superintendent to maintain the present Honor Concept for disposing of cases involving midshipmen's offenses and whether the Honor Concept standards maintained by the Superintendent are in violation of the due process clause of the Fifth Amendment, for the procedures fail to meet minimum standards of fairness generally granted unto members of the military community in relation to the severity of the punishment.

Further, this case presents the occasion of reviewing the procedures of the Superintendent in recommending to the Respondent the discharge of midshipmen from the Naval Academy and the Respondent's ordering to active duty midshipmen who are not physically qualified for appointment as a commissioned officer in the Regular Navy.

Therefore, it is respectfully requested a Writ of Certiorari be allowed and that this Court review the Order of the United States Court of Appeals for the District of Columbia Circuit and reverse the same.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1980

No. 80-1904

[Filed: June 12, 1981]

Midshipman First Class
JOHN E. MURPHY, U.S. Navy,
Appellant,

v.

Civil Action No. 80-01069
and
Consolidated Case No. 80-2533

JOHN LEHMAN,
Secretary of the Navy

ARGUED 4-28-81

BEFORE: MacKinnon and Edwards, Circuit Judges and Ronald N. Davies,* Senior District Judge for the District of North Dakota

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ORDER

On consideration of appellant's motion for leave to file petition for rehearing and suggestion for rehearing with affidavit, memorandum and to amend suggestion, it is

ORDERED by the Court that the aforesaid motion is granted and the Clerk is directed to file appellant's

lodged petition for rehearing and suggestion for rehearing *en banc*, and, it is

FURTHER ORDERED by the Court that appellant's petition for rehearing is denied.

Per Curiam

FOR THE COURT:

George A. Fisher, Clerk

By: /s/ Robert A. Bonner
Chief Deputy Clerk

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*Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1980

No. 80-1904

[Filed: May 1, 1981]

Midshipman First Class
JOHN E. MURPHY, U.S. Navy,
Appellant

v. **Civil Action No. 80-01069**

JOHN LEHMAN,
Secretary of the Navy

No. 80-2533

JOHN E. MURPHY, U.S. Navy,
Appellant

v. **Civil Action No. 80-01919**

JOHN F. LEHMAN, JR.,
Secretary of the Navy

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: MACKINNON and EDWARDS, Circuit Judges, and RONALD N. DAVIES,* Senior District Judge for the District of North Dakota

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JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the judgments of the District Court on appeal herein are hereby affirmed.

Per Curiam

For the Court

/s/ George A. Fisher
Clerk

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1919

[Filed: Oct. 16, 1980]

JOHN E. MURPHY,
Petitioner,

v.

EDWARD HIDALGO,
Respondent.

MEMORANDUM ORDER

This action comes before the Court on petition for writ of habeas corpus under 28 U.S.C. § 2243. Petitioner claims that he had been illegally enlisted and detained in the United States Navy. Respondent, the Secretary of the Navy, was ordered to show cause why a writ of habeas corpus should not issue. The Court has considered the petition, respondent's return and answer to the order to show cause, the reply to that return and answer, and the response to the reply, and has determined that the request for writ of habeas corpus must be denied.

Petitioner is presently an enlisted member of the U.S. Navy. While a midshipman at the Naval Academy, he was charged with violations of the Academy's honor code prohibition against plagiarism. After a full hearing before the Honor Board, personal hearings before the

Commandant of Midshipmen and the Superintendent of the Academy, and presentation of evidence directly to the Secretary by means of a show cause statement, the Assistant Secretary of the Navy, acting on behalf of the Secretary, discharged petitioner from the Academy into the naval Reserve and transferred him to active duty as an enlisted man for three years pursuant to 10 U.S.C. §§ 6956, 6962. In a previous action, *Murphy v. Hidalgo*, Civil Action No. 80-1069, petitioner attempted to stay his separation from the Naval Academy and his transfer to enlisted status, primarily on the ground of violation of his procedural rights. In Memorandum Opinions of June 4, 1980, granting summary judgment to respondent, and July 3, 1980, denying a motion to vacate the June 4 judgment, these challenges to his separation and transfer were denied.[1]

Petitioner's main claim in the present action is that he is not physically qualified for enlistment in a reserve component due to chronic motion sickness. The record shows that a Medical Board convened at the Naval Academy on December 11, 1979, concurred in this assessment of petitioner's state of health. The Decem-

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[1] In paragraphs 13 and 14 of his petition, petitioner summarily repeats his claims that his transfer from the Naval Academy to the Naval Reserve was illegal and void and that his statutory and constitutional procedural rights have been violated. Although the previous judgments in favor of respondent are not *res judicata* in this habeas corpus proceeding, the fact that the same issues were decided in a former proceeding may be given controlling weight as a matter of judicial discretion. *Pope v. Huff*, 141 F.2d 727 (D.C.C. 1944). See *Parker v. Estelle*, 558 F.2d 312 (5th Cir. 1977); *Polizzi v. United States*, 550 F.2d 1133 (9th Cir. 1977). Since petitioner has raised no issue of manifest unjustice or change in the law since the decisions in Civil Action No. 80-1069, the Court finds no reason to reconsider these issues previously decided by Judge Flannery. See *Parker v. Estelle, supra.*

ber 14 Report of the Board noted that while this defect would normally disqualify him for service, he could render useful service in the Navy with certain restrictions. Therefore, it recommended that the defect be waived and that, upon graduation from the Academy, petitioner's duty be limited to shore assignments. The same day petitioner signed a statement that he did not wish to rebut the recommendations of the Medical Board, and he was granted a waiver to permit him to serve on active duty in an assignment limited to shore duty.

Petitioner's restricted assignment was effected pursuant to Bureau of Personnel Manual 1830120, which provides for such assignment of enlisted men on active duty "whose physical condition falls below the standard normally acceptable for retention." This regulation, it is argued, applies only to enlisted men, and not to a midshipman who by order of respondent was transferred to active duty in the Naval Reserve in an appropriate enlisted grade. The short answer is that at the time he was given his "limited duty designation" on May 5, 1980, he had already been transferred to enlisted status one week before, on April 28.

Petitioner further claims that his statement acquiescing in waiver of his physical defects concerning his status after graduation from the Academy was as a commissioned officer, and that he did not request a waiver in order that he may be enlisted. That claim has no validity.

First, petitioner points to no regulation in support of his statement that he could not be required to be in the Navy on less than full duty status but only to facts "well recognized within the Armed Forces" (Reply, p. 4). In the absence of law or valid regulation, there is no basis for holding that persons unable to perform full duty

are entitled to be discharged from the armed services. Second, the fact is that petitioner did sign a waiver of physical standards. A waiver of such standards pertaining to motion sickness for five years of commissioned service (the active duty obligation petitioner would have incurred had he graduated from the Academy) would necessarily include a waiver for three years of enlisted service, and, according to the affidavit of Captain D. F. Bleir, Director of the Physical Standards Division, Bureau of Medicine and Surgery, Department of the Navy, to the extent that there are differences in the physical standards for officers and enlisted members the standards for officers are higher. Finally, it is clear that the physical fitness standards are for the benefit of the armed forces, not those of servicemen who would use them to escape their military obligations. *Ex Parte Blackington,* 245 Fed. 801 (D. Mass. 1917); cf. *American Federation of Government Employees v. Hoffman,* 427 F. Supp. 1048 (N.D. Ala. 1976).

Petitioner has given the Court no reason to overturn the Navy's determination that he is medically fit for military duty on a limited basis, especially given that the narrow standard for the review of such a determination is whether there was a basis in fact therefor. See *Burke v. United States,* 509 F.2d 1227 (1975); *Petition of Bank,* 290 F. Supp. 120 (N.D. Cal. 1968). The basis in fact for petitioner's fitness—that chronic motion sickness will not impede his rendering service to the Navy on shore—is obvious.

Respondent has shown cause why the writ of habeas corpus should not issue, and the petition for such writ will accordingly be dismissed.

For the reasons stated, it is this 16th day of October, 1980,

ORDERED That the Order to show cause why the Writ of Habeas Corpus should not issue be and it is hereby discharged, and it is further

ORDERED That the petition for Writ of Habeas Corpus be and it is hereby dismissed.

/s/ Harold H. Greene
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1069

[Filed: July 3, 1980]

Midshipman First Class
JOHN E. MURPHY, U.S. Navy,
Plaintiff,

v.

HONORABLE EDWARD HIDALGO,
Secretary of the Navy,
Defendant.

MEMORANDUM OPINION

This matter comes before the court on the plaintiff's motion to vacate this court's order granting the defendant's motion for summary judgment. The order was rendered during a hearing on May 22, 1980, and an appropriate Memorandum Opinion and Judgment were issued on June 4, 1980. As indicated in the Memorandum Opinion, the court found that the plaintiff had suffered no violation of his statutory or constitutional rights.

This case involves a midshipman discharged from the United States Naval Academy for plagiarism on a final examination. Although now, as before, the plaintiff's

legal position is not entirely clear, he appears to argue that his discharge violated his constitutional right to procedural due process. In the earlier Memorandum Opinion, this court stated:

> If the plaintiff is alleging a violation of his right to due process guaranteed by the fifth amendment, this allegation must fail. He has received abundant procedural protection of his rights from a hearing before the Academy's Honor Board, at which the plaintiff appeared personally, through various channels up to the Secretary of the Navy.

The plaintiff has presented no new basis in law or fact to warrant a change of this holding.

The plaintiff argues that in midshipmen's disciplinary proceedings, as in proceedings before courts-martial, accused parties are entitled to representation by qualified lawyers, whereas here the plaintiff was represented before the Honor Board only by another midshipman. This argument must be rejected.

The proceedings challenged here were not criminal in nature. As the United States Court of Appeals for this circuit has expressly determined with respect to military academy proceedings,

> Although the proceedings leading to separation deal with very significant issues and rights, they are not criminal proceedings to determine "guilt"; rather they are procedures designed to determine the fitness of a member of the military establishment to be commissioned by the President as an army officer on criteria which embody military considerations evolved by both military leaders and the [academy] itself.

Denmar v. Ailes, 348 F.2d 51, 52 n.1 (D.C. Cir. 1965).

Hence, the procedural requirements for normal criminal proceedings do not apply here. *See Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967) (specifically rejecting the contention a cadet discharged from the Merchant Marine Academy was entitled to representation by counsel).[1]

The question is whether Murphy's "separation from the military service was accomplished by procedures that failed to meet the minimum standards of fundamental fairness." *Dunmar v. Ailes*, 348 F.2d at 54. Here there is no allegation that Murphy was not apprised of the charges against him well in advance of the hearing. There is no allegation that the Honor Board was biased or improperly constituted. There is no allegation that the midshipman advisor who accompanied Murphy at the hearing was improperly selected or hostile to Murphy, although Murphy now argues that the advice to plead guilty was "not in Plaintiff's best interests." It appears that the virtually undisputed facts of Murphy's offense were thoroughly developed at the hearing, and the determination of the Honor Board that Murphy should be separated from the Academy was reviewed at several levels. Under all these circumstances the court is persuaded that the proceedings leading to Murphy's separation from the Academy were fundamentally fair.

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[1] That the proceedings under review here were not criminal in nature disposes not only of Murphy's contention that he was constitutionally entitled to representation by counsel but also of his contention that the adverse findings of the Honor Board must have been "beyond a reasonable doubt." There is no evidence or allegation that the Honor Board had reasonable doubt as to its determination, but in any event that stringent standard is appropriate only for findings of criminal guilt.

For these reasons the plaintiff's motion to vacate must be denied.

/s/ Thomas A. Flannery
United States District Judge

Dated: 7-2-80

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1069

[Filed: June 4, 1980]

Midshipman First Class
JOHN E. MURPHY, U.S. Navy,
Plaintiff,

v.

HONORABLE EDWARD HIDALGO,
Defendant.

MEMORANDUM OPINION

This case involving a midshipman discharged from the U.S. Naval Academy comes before the court on three motions. The defendant moves to dismiss or, in the alternative, for summary judgment. The plaintiff moves for reinstatement of a temporary restraining order issued against the defendant on April 29, 1980, but dissolved on April 30, 1980. The plaintiff has also moved for an order to show cause why Lt. Commander John M. Oyler, U.S. Naval Academy Midshipmen Personnel Officer, should not be held in contempt of court for testifying falsely before this court on April 30, 1980, but that motion has been withdrawn.

The court is persuaded that the plaintiff's motion for reinstatement of the April 29, 1980 temporary restrain-

ing order should be denied, and the defendant's motion for summary judgment should be granted.

Discussion

The plaintiff argues in support of his motion for reinstatement that Oyler wrongfully testified that the plaintiff had, by April 25, 1980, completed the medical examinations necessary for separation from the U.S. Naval Academy. He argues that this wrongful testimony "caused this Court to rescind the then issued temporary restraining order," and therefore that order should be reinstated.

This motion is flawed in three respects. First, it appears from the affidavit of Captain James C. Hodges, Senior Medical Officer, U.S. Naval Academy, that Oyler's testimony was in fact accurate, *i.e.*, that the plaintiff was medically qualified, consistently with the applicable regulations, for separation from the U.S. Naval Academy at the time indicated by Oyler. Second, the plaintiff is wrong in arguing that it was this testimony that "caused" the court to rescind the temporary restraining order. Rather, the court was persuaded that the plaintiff had not satisfied the traditional requirements for issuance of such an order; in particular, he had failed to show a likelihood of prevailing on the merits. Finally, even if Oyler's testimony was false, and even if that testimony had caused the rescission of the temporary restraining order, the court is not persuaded at this time that the plaintiff is likely to prevail on the merits. Hence, the motion should be denied.

The substantive basis for the plaintiff's position is not entirely clear. He seeks declaratory and injunctive relief against the Secretary of the Navy for discharging the

plaintiff from the U.S. Naval Academy for plagiarism. If the plaintiff is alleging a violation of his right to due process guaranteed by the fifth amendment, this allegation must fail. He has received abundant procedural protection of his rights, from a hearing before the Academy's Honor Board, at which the plaintiff appeared personally, through various channels up to the Secretary of the Navy.

The plaintiff refers to 10 U.S.C. §§ 6959 and 6962. The former section simply imposes various general requirements on midshipmen at the Naval Academy and provides that a midshipman who does not comply with those requirements may be transferred out of the Naval Academy to the Naval Reserve or the Marine Corps Reserve. The latter section provides that whenever the Superintendent of the Naval Academy determines that a midshipman's conduct is "unsatisfactory" the Superintendent "shall submit to the Secretary of the Navy in writing a full report of the facts." It also provides that the midshipman in question may examine this report and reply to it in writing and that thereafter, if the Secretary of the Navy believes the Superintendent's determination is "reasonable and well founded," the midshipman may be discharged.

The plaintiff alleges that the report to the Secretary of the Navy, submitted by the Superintendent in compliance with section 6962, contained factual errors. In particular, it included a memorandum from the Commandant of Midshipmen indicating that the plagiarized paper in question was a "five page paper," when in fact the body of the paper was six pages. The court is not persuaded that this error is so significant as to rise to the level of a violation of section 6962. The plaintiff also charges that the midshipman adviser who attended the

Honor Board hearings with the plaintiff erred to the plaintiff's detriment in advising the plaintiff to plead guilty to the charge of plagiarism. This allegation goes not to the question to whether section 6962 was violated, however, but instead to the question of whether the plaintiff suffered some violation of his procedural rights. As indicated above the court is persuaded that no such violation occurred. It appears therefore that the plaintiff has suffered no violation of his constitutional or statutory rights, and the defendant's motion for summary judgment should be granted.

An appropriate Judgment accompanies this Memorandum Opinion.

/s/ Thomas A. Flannery
United States District Judge

APPENDIX F

CONSTITUTION OF THE UNITED STATES

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

10 UNITED STATES CODE

§ 505. Regular components: qualifications, term, grade

(a) The Secretary concerned may accept original enlistment in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard, as the case may be, of qualified, effective, and able-bodied persons who are not less than seventeen years of age nor more than thirty-five years of age. However, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control.

§ 510. Reserve components: qualification

(a) To become an enlisted member of a reserve component a person must be enlisted as a Reserve of an armed force and subscribe to the oath prescribed by section 502 of this title, or be transferred to that component according to law. In addition, to become an enlisted member of the Army National Guard of the United States or the Air National Guard of the United States, he must meet the requirements of section 3261 or 8261 of this title.

(b) Except as otherwise provided by law, the Secretary concerned shall prescribe physical, mental, moral, professional, and age qualifications for the enlistment of persons as Reserves of the armed forces under his jurisdiction. However, no person may be enlisted as a Reserve unless—

(1) he is a citizen of the United States or has been lawfully admitted to the United States for permanent residence under chapter 12 of title 8; or

(2) he has previously served in the armed forces or in the National Security Training Corps.

(d) A person who is otherwise qualified, but who has a physical defect that the Secretary concerned determines will not interfere with the performance of the duties to which that person may be assigned, may be enlisted as a Reserve of any armed force under the jurisdiction of that Secretary.

§819. Art. 19. Jurisdiction of special courts-martial.

Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any non-capital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening author-

ity shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

Aug. 10, 1956, c. 1041, 70A Stat. 43; Oct. 24, 1968, Pub.L. 90-632, §2(5), 82 Stat. 1335.

§ 6959. Midshipmen: agreement for length of service

(a) Each midshipman who is a citizen or national of the United States shall sign an agreement that, unless sooner separated, he will—

(1) complete the course of instruction at the Naval Academy;

(2) accept an appointment and serve as a commissioned officer of the Regular Navy, the Regular Marine Corps, or the Regular Air Force for at least five years immediately after graduation; and

(3) accept an appointment as a commissioned officer in the reserve component of the Navy or the Marine Corps or as a Reserve in the Air Force for service in the Air Force Reserve and remain therein until the sixth anniversary of his graduation if an appointment in the regular component of that armed force is not tendered to him or if he is permitted to resign as a commissioned officer of that component before that anniversary.

If the midshipman is a minor and has parents or a guardian, he may sign the agreement only with the consent of the parents or guardian.

(b) A midshipman who does not fulfill his agreement under subsection (a) may be transferred by the Secretary of the Navy to the Naval Reserve or the Marine Corps Reserve in an appropriate enlisted grade or rating, and, notwithstanding section 651 of this title, may be ordered

to active duty to serve in that grade or rating for such period of time as the Secretary prescribes but not for more than four years.

§ 6962. Midshipmen: discharge for unsatisfactory conduct or inaptitude

(a) The Superintendent of the Naval Academy shall submit to the Secretary of the Navy in writing a full report of the facts—

(1) whenever the Superintendent determines that the conduct of a midshipman is unsatisfactory; or

(2) whenever the Academic Board unanimously determines that a midshipman possesses insufficient aptitude to become a commissioned officer in the naval service.

(b) A midshipman upon whom a report is made under subsection (a) shall be given an opportunity to examine the report and submit a written statement thereon. If the Secretary believes, on the basis of the report and statement, that the determination of the Superintendent or of the Academic Board is reasonable and well founded, he may discharge the midshipman from the Naval Academy and from the naval service. Aug. 10, 1956, c. 1041, 70A Stat. 432.